Supreme Court of the United States.

October Term, 1926.

THOMAS CROSSETT,
Appellant,

vs.

ROGERS D. WORTLEY, United States Marshal for the Eastern District of Michigan,

No. 172.

REPLY BRIEF FOR APPELLANT.

BOTSFORD PRINTING CO., DETROIT, MICH.

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THOMAS COSGROVE, *Appellant,* *vs.* EUGENE D. WINNEY, United States Marshal for the Eastern District of Michigan.	No. 172.

REPLY BRIEF FOR APPELLANT.

Our attention is first directed to the definition the learned Solicitor General gives to the word "voluntarily" used in the marshal's return to the writ of *habeas corpus.*

On page 4 of his brief, he says: "If he [Cosgrove] came into the United States on any matter in anywise connected with his extradition, it could not be said that he came voluntarily. Coming into the United States at the call of the sureties on his bail bond, or to prepare for his trial, or to attend his trial, would be a coming under compulsion." Webster's dictionary, generally considered good authority on definition of words and terms, does not support him. This author shows the adjective "voluntary" to be a relative term, and gives it a meaning in law

as, "According to the will, consent, or agreement of a party." "Voluntarily," is an adverb, and signifies in a voluntary manner. Having agreed with his sureties, whether specially requested by them or not, for the purpose of continuing within the state, or to attend his trial, and returning for that purpose, is a voluntary act, and bears with it the purpose of the necessary preparation for his trial.

It is presumed that every man is law-abiding and performs his social duties. (Greenleaf on Ev., Sec. 40.) The presumption gathered from the the record in this case is that if Cosgrove went to Canada, he had the assent of the sureties on his bail bond, and returned keeping faith with his obligation to his sureties. This presumption is strengthened by the fact that the sureties were not complaining in their exercise of custody over Cosgrove at any time. It is a fact of general knowledge that sureties will not put up $1000 before an earnest and vigorous effort to surrender in their discharge the principal in the bail bond. Neither does it follow that if Cosgrove returned to the United States on any matter connected with his extradition, he came involuntarily. He was here within his bail limits. Further over in brief for appellee (p. 17,) counsel argues that the sureties had no control over Cosgrove in Canada. It would be difficult to harmonize these two positions. For it is clear that the sureties had no control over Cosgrove, except in the extradition case, and if he did return from Canada in any matter connected with his extradition, such return must have been voluntary.

In a somewhat lengthy argument in the brief of opposing counsel (pages 8-13) the right to resort to stratagem is treated. None of the cases there cited arose under an extradition treaty. Stratagem is not extradition. Kidnapping is not extradition. These are methods foreign to extradition treaties. If the law

upheld a government directly and itself to take by fraud from a foreign government a person who has there his asylum, it would be a risky game. Treaties furnish a legal and safe procedure. Extradition treaties do not allow the surrender of a person on one charge for the purpose of placing him on trial upon another charge, whether differing in kind or severity of penalty. It is not claimed by the appellee that stratagem was resorted to take Cosgrove on the capias. The Marshal, in his return to the writ of habeas corpus, says he *found* Cosgrove in Michigan, and there arrested him. And the only business that the Marshal, his counsel, the district court, or anybody else reveals that Cosgrove was attending to or had to look after in Michigan, was the bringing on and trial of his case in the recorder's court of Detroit, to which he had been extradited, and was then at large on bail within the state and district.

At the bottom of page 15 and extending on page 16 of his brief, counsel for appellee says: "I am quite willing to concede that if Cosgrove had remained in the State of Michigan, within the United States, under the jurisdiction of this government, and within reach of his bail, he would be exempt as he claims." This is a concession that a person on *bail is in custody*. It is a concession that a release on bail is not the release within the meaning of the treaty provision. It is a concession that the opportunity afforded the extradited person enlarged on bail to return to the country of his asylum, is not the opportunity contemplated in the treaty. Cosgrove when arrested on the capias issued in this case, was within the State of Michigan, within the United States, and was on bail in the extradition case pending in the state court. He was within the jurisdiction and custody of his sureties in the extradition case, and could surrender himself or his sureties could surrender him to the state court in that case, up to

the very time of his arrest on the capias. *It is the condition of affairs that existed at the very instant of Cosgrove's arrest on the capias which forms the test of the legality or the illegality of that arrest.* The contention of the learned solicitor-general falls within his concession above stated.

All the cases cited and reviewed by counsel for appellee in his brief (pages 15-19) on the subject of bail, involved the question of the liability of the sureties on the bail bond. His whole argument is in that line and has no other basis. Not a case is cited where the act of the principal to the prejudice of his bail has been construed to affect the right of the principal to the protection of an extradition treaty. In *Taylor vs. Taintor, 16 Wall., 372*, this court said that the liberties which the sureties allowed their principal and their control over him was a matter for the sureties to bear the burden of the consequences, and could not cast them upon the obligee. And in *Ex parte Coy, 32 Fed. Rep., 917*, the court held that the extradited person on bail could not, by his act while so on bail, waive or cancel the right possessed by the government surrendering him under the extradition proceedings, that he should be tried in the country to which he was surrendered upon the extradition charge and no other. The treaty is a contract between two governments. Neither the person extradited under the treaty nor the surety on his bail bond for his appearance in the extradition case was a part of that treaty contract. And neither the principal nor the surety has power to release the demanding government from its obligation to the surrendering government to try the person extradited on the charge upon which he was surrendered, and no other charge of offense occurring prior to his extradition until a reasonable time after the final termination of that case.

In this connection we will answer the question asked

at the very conclusion of the brief of counsel for appellee. Counsel there assumes that it is possible for a person extradited under a treaty to free himself from the extradition cause while that cause exists. If the accused in jail in Michigan, in the extradition cause, break jail and go to Canada and then return to Michigan for any purpose, being free to surrender himself or to be taken by his jailers for incarceration in the extradition cause, his act by so doing would not in the least affect the obligation of this government to the British government to try the accused on the charge upon which he was extradited, and upon no other charge occurring prior to his extradition.

The case of Cosgrove rests within the concession on page 20 of brief for appellee. Counsel there says: "I do not contend that if he had come into the United States on a matter connected with his extradition, to prepare for or attend his trial, he would be subject to arrest and prosecution for another offense." In Cosgrove's petition for *habeas corpus* (Rec., p. 2) he said: "Your petitioner has been held for trial in said recorder's court, but has not been tried, released or discharged by said recorder's court, and is still in the custody of said recorder's court, although *your petitioner has often requested to be placed on trial before said recorder's court on said charge of larceny.*" This was not traversed in the return to the writ of *habeas corpus.*

The marshal's return states that when taken on the capias, Cosgrove was on bail in the extradition cause, and while so on bail had been back to Canada and voluntarily returned to Michigan, where the marshal found him and arrested him on the capias. This is no denial that Cosgrove was in Michigan urging his trial in the state court on the extradition charge. And in the statement of facts at the top of page three of brief for appellant, referring to the case in the recorder's court, we said: "The

trial thereof urged by Cosgrove to the time of his arrest on the capias issued from the district court, and to the time of suing out the *habeas corpus* (Rec., p. 2.)" And again at the middle of the same page, we said: "The *capias was* not *served* until Dec. 14, 1896, and *while appellant was on bail within the district awaiting his trial on the extradition charge of larceny*, in the recorder's court." These allegations were in the statement of facts in the brief for appellant, and were not controverted in the statement of facts in the brief for appellee, and must be taken as conceded by appellee. Such, we think, is the proper construction of supreme court rule 21, part 3.

We submit that the judgment of the district court should be reversed and the appellant discharged from detention.

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